

1 HONORABLE RONALD B. LEIGHTON
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 DEBORAH J.M. OBERG,

11 Plaintiff,

12 v.

13 MICHAEL J. ASTRUE, Commissioner of
14 Social Security,

Defendant.

No. 09-cv-5526-RBL

ORDER

(Dkt. #44)

15 Before the Court is Plaintiff's Motion for Attorney's Fees (Dkt. #44) under the Equal
16 Access to Justice Act, 28 U.S.C. § 2412 ("EAJA"). The motion is granted.
17

18 **I. FACTUAL SUMMARY**

19 This case presents highly unusual circumstances and only those facts necessary to
20 resolution of the motion are presented here. The case arises out of the denial of Plaintiff's
21 application for disability insurance benefits. Plaintiff appealed the denial on a number of
22 grounds, including that the Administrative Law Judge ("ALJ") had "reopened" a prior
23 application period, that the ALJ improperly discredited Plaintiff's testimony, and that the ALJ
24 improperly relied on an analysis from Plaintiff's previous application. *See Oberg v. Astrue*, No.
25 11-35047, at 2–4 (9th Cir. Mar. 19, 2012) (unpublished memorandum disposition). The Ninth
26 Circuit found those arguments meritless. The appellate court held, however, that the ALJ had
27 made two errors. First, the ALJ erred in considering Plaintiff's age—she was 50, not 48—and
28 reversed on that basis. *See id.* at 4. Further, the Ninth Circuit held that the Appeals Council

1 gave erroneous reasons for rejecting lay affidavits presented by Plaintiff to the Appeals Council
 2 after the administrative decision. *Id.* The Appeals Council reasoned that the affidavits pertained
 3 to a time period *after* the ALJ ruled. The Ninth Circuit disagreed—the affidavits pertained to the
 4 relevant time period.

5 Plaintiff requests \$14,297.19, expenses of \$63.70, and costs in the amount of \$814.99.

6 II. DISCUSSION

7 A. Standard

8 The EAJA provides for prevailing-party attorney's fees when the government's position
 9 is not "substantially justified":

10 [A] court shall award to a prevailing party other than the United States fees and
 11 other expenses, in addition to any costs awarded pursuant to subsection (a),
 12 incurred by that party in any civil action (other than cases sounding in tort),
 13 including proceedings for judicial review of agency action, . . . unless the court
 finds that the position of the United States was substantially justified or that
 special circumstances make an award unjust.

14 28 U.S.C. § 2412(d)(1)(A). The government's position is substantially justified if—although
 15 incorrect—it is "justified to a degree that could satisfy a reasonable person" or has a "reasonable
 16 basis in both law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565, 566 n.2 (1988). The
 17 government bears the burden to show its position—which includes both the agency's original
 18 actions and the government's subsequent defense—was substantially justified. *Flores v. Shalala*,
 19 49 F.3d 562, 570 (9th Cir. 1995); 28 U.S.C. § 2412(d)(2)(D); *see also Kali v. Bowen*, 854 F.2d
 20 329, 332 (9th Cir. 1988). Importantly, the government's failure to prevail "does not raise a
 21 presumption that its position was not substantially justified." *Kali*, 854 F.2d at 334.

22 B. The Age Error

23 These standards do not compel a clear outcome in this case, an unsurprising result given
 24 the odd posture. The Ninth Circuit reversed on an issue that Plaintiff had waived. Indeed, the
 25 issue was raised *by the Government* in its response brief to the appellate court. Thus, the appeal
 26 process was almost certainly prolonged by the late discovery of the ALJ's error.

27 Further, the ultimate effect of the ALJ's error remains to be seen. The Government
 28 argues that the reversal is immaterial to the ALJ's ultimate conclusion. In its words, the "court

1 of appeals did not find that the change in Plaintiff's age category was actually material in this
 2 case" and did not therefore reverse the ALJ's conclusion. (Def.'s Resp. at 4, Dkt. #46.)
 3 Essentially, the ALJ erred in reasoning, but not necessarily in conclusion.

4 But contrary to the Government's contention, the age error was significant enough that
 5 the Ninth Circuit remanded to the ALJ for reconsideration rather than simply holding the error
 6 harmless. Thus, while the ALJ's conclusion may or may not change on remand, the Court must
 7 conclude that the ALJ's reasoning, and thus its position—was not substantially justified. The
 8 ALJ's conclusion was based upon a fundamental error, and the Government has not carried its
 9 burden to establish that its position was substantially justified.

10 **C. The Affidavit Error**

11 The parties dispute whether the Appeals Council's error was actually grounds for
 12 reversal. The Ninth Circuit notes that the Council offered erroneous reasons for rejecting the
 13 affidavits—but simultaneously notes that the Council need not state any reason at all. *See Oberg*
 14 *v. Astrue*, No. 11-35047, at 2–4 (9th Cir. Mar. 19, 2012) (unpublished memorandum disposition).
 15 Indeed, the Appeals Council is “not required to make any particular evidentiary finding when it
 16 reject[s] evidence . . . obtained after an adverse administrative decision.” *Taylor v. Comm'r of*
 17 *Soc. Sec. Admin.*, 659 F.3d 1228, 1232 (9th Cir. 2011) (citing *Gomez v. Chater*, 74 F.3d 967, 972
 18 (9th Cir. 1996)). Again, the appellate court did not comment on whether such evidence would
 19 change the ALJ's ultimate conclusion. It is unclear to the Court whether the Ninth Circuit
 20 thought the Council's error sufficient to merit reversal, or whether the error was discussed
 21 merely because the case was already being remanded due to the age error. Thus, it is unclear
 22 whether the government's position was substantially justified, and the Court must therefore
 23 conclude that the Government failed to carry its burden. Although, the Court must
 24 simultaneously conclude that this holding played only a small role in the Ninth Circuit's reversal.

25 **D. Fees**

26 The Court finds that the “special circumstances” discussed above make a full award of
 27 fees inappropriate. While it was the ALJ's error that generated this litigation, the litigation was
 28

1 unduly lengthy because the primary basis for reversal was discovered only at the latest possible
 2 moment—and not by Plaintiffs' counsel. Some concession on fees is therefore warranted.

3 In determining appropriate fees, a court must consider the results obtained, i.e., whether
 4 the prevailing party “achieve[d] a level of success that makes the hours reasonably expended a
 5 satisfactory basis for making a fee award?” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).
 6 Where a plaintiff has obtained excellent results, her counsel should normally recover all hours
 7 reasonably expended on the litigation times a reasonable hourly rate. Where a plaintiff obtained
 8 complete relief, the fee award should not be reduced on the grounds plaintiff pursued “certain
 9 issues of fact and law that ultimately did not become litigated issues in the case or upon which
 10 plaintiff[] did not prevail.” *Id.* at 431 (citing *Davis v. County of Los Angeles*, 8 F.P.D. 9444,
 11 5049 (C.D.Cal.1974)). But, if a plaintiff achieved only partial or limited success, this simple
 12 calculation may result in an excessive award. *Id.* at 436. Simply saying that a plaintiff is “a
 13 prevailing party therefore may say little about whether the expenditure of counsel's time was
 14 reasonable in relation to the success achieved.” *Id.* Thus, where a plaintiff achieves partial
 15 success, the Court should focus on the significance of the overall relief obtained in relation to the
 16 hours reasonably expended on the litigation. *Id.* at 435.

17 Although the Ninth Circuit remanded the case, the grounds for remand do not necessarily
 18 suggest that the ALJ’s conclusion was wrong (although that question is certainly for the ALJ, not
 19 this Court). Further, Plaintiff won its appeal on an issue it did not raise, thus making a sizable
 20 amount of the time spent on appeal worthless.

21 As other courts have noted, “there is no precise formula for making fee determinations
 22 and in this particular case no precise way of assessing the exact success” of a plaintiff. *Hanif v.*
Astrue, No. 11-cv-0513, 2012 WL 933086, at *3 (W.D. Wash. Feb. 14, 2012). The Court will
 23 reduce the award by the hours expended on Plaintiff’s opening appellate brief, a brief which
 24 should have but did not contain the basis on which the Ninth Circuit remanded. The
 25 Government’s disclosure of the ALJ’s in its response brief makes Plaintiffs’ reply and oral
 26 argument necessary.
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1 In sum, the Court finds that counsels' rates (\$172.24 in 2009; \$175.06 in 2010; \$1789.51
 2 in 2011; and \$182.37 in 2012) are reasonable. Mr. Halpern's hours as requested are reasonable,
 3 and Mr. Baird hours will be reduced to 20.8, reflecting the reduction discussed above.¹ Mr.
 4 Halpern's fees are therefore \$6,115.98; Mr. Baird's are \$3,765.27. Plaintiff must submit an
 5 itemized bill of costs distinguishing trial costs (which are recoverable) from appellate costs
 6 (which are not recoverable, per the Ninth Circuit's order). Thus, the total fees are \$9,881.25.

7 Additionally, the Government has rightly noted that the Ninth Circuit ordered the parties
 8 to bear their costs on appeal, and Plaintiff has not given an itemized bill of costs such that the
 9 Court can determine which costs were incurred at the district court and which costs were
 10 incurred on appeal. If Plaintiff wishes to recover costs, she must file an itemized bill. For ease
 11 and efficiency, Plaintiff is requested to confer with opposing counsel about whether the costs
 12 will be challenged and advise the Court regarding such.

13 **III. CONCLUSION**

14 The total award—\$9,944.95 (\$9,881.25 in fees and \$63.70 in expenses)—shall be
 15 delivered via check to Plaintiff's counsel, Elie Halpern at Elie Halpern & Associates, PLLC,
 16 1800 Cooper Pt. Road S.W., Bldg. 19, Olympia, Wa. 98502.

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 18 Dated this 23rd day of August 2012.



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 20 Ronald B. Leighton
 21 United States District Judge
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28¹ The hours awarded are for appellate expenditures from July 19, 2011 onward. (See Decl. of Elie Halpern, Dkt. #44, Ex. A at 3.)